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THE APPOINTING POWER.

OF all the questions which have arisen under the Constitution of the United States, except those which relate to the division of powers between the general Government and the States, the most interesting are those which bear upon the power to appoint and remove executive officers. The Constitution declares that the "executive power shall be vested in a President"; that "he shall take care that the laws be faithfully executed"; and that, "before entering upon the execution of his office, he shall take an oath, or affirmation, to preserve, protect, and defend the Constitution of the United States."

The President performs few executive duties except through subordinate officers. So far as the control of his subordinates is transferred from him, so far the executive power, and the power to see that the laws are faithfully executed, and the power to defend and protect the Constitution, are removed from him. So far as they are taken from the President to be given to the Senate, they are taken from an officer individually responsible and impeachable, and transferred to a numerous assembly acting on such questions in secret without individual responsibility; taken from an officer who in practice is elected by and represents the whole people, and transferred to a body elected by State legislatures, representing States, in which Delaware and New York have an equal vote; taken from an officer whose term is but four years and transferred to a body which is perpetual, though composed of members whose tenure is for six years.

If Congress may rightfully establish a tenure of executive office, beyond the control of the President's power of removal, it may pass a law just before the incoming of a new President which shall keep in office every subordinate in the country. If the legislature may ordain that no executive officer shall be

removed without the consent of the legislature or one branch of it, then the political character of the executive cannot be changed without changing the political character of the legislature, or of the branch of it whose consent to such removal is made necessary. In this way the executive powers conferred by the Constitution, if not destroyed altogether, may be completely subjected to another branch of the Government.

In the great debate of 1789, which Mr. Evarts declares "decidedly the most important and best considered debate in the history of Congress," those who claimed that the power of removal vested absolutely in the President under the Constitution prevailed in the House of Representatives, under the lead of Madison, by a majority of twelve, and by the casting vote of John Adams in the Senate. Mr. Madison said:

"The decision that is at this time made will become the permanent exposition of the Constitution; and on a permanent exposition of the Constitution will depend the genius and character of the whole government."

Mr. Webster, in 1835, earnestly dissenting from the original decision, still admitted that he considered it "a settled point; settled by construction, settled by precedent, settled by the practice of the Government, and settled by statute." It remained so settled, until, in the strife which followed the rebellion, a two-thirds majority in Congress was induced by apprehension of a grave public danger to attempt to wrest this portion of the executive power from the hands of Andrew Johnson. The statute of March 2, 1867, as construed by nearly two-thirds of the Senate, enacted that officers appointed by the predecessor of President Johnson, who, by the law in force when they were appointed, and by the express terms of their commission, were removable at the pleasure of the President, should remain in office until the Senate should consent to the appointment of their successors, or approve the reasons for their removal.

This statute partially served its purpose during the last two years of Johnson's administration. Five days after Grant's inauguration, the House of Representatives, by a vote of 138 to 16, passed a bill totally repealing it. The Senate was unwilling to let go the hold which it had acquired on the executive power, but proposed to suspend the law for one year, so that there might be no obstacle in the path of General Grant to the removal of the obnoxious officials who had adhered

to Andrew Johnson. The present law was agreed on as a compromise. It permits the President to suspend officers during the vacation of the Senate, but restores officers so suspended at the close of the next session, unless, in the meantime, the advice and consent of the Senate has been obtained to a removal or the appointment of a successor.

President Grant, in his message of December, 1869, urged the repeal of this modified act on the ground that —

“It could not have been the intention of the framers of the Constitution that the Senate should have the power to retain in office persons placed there by Federal appointment, against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an executive put in officials forced on him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an administration which they know does not trust them?”

The House acted on this recommendation, and passed a bill for the repeal of the statutes of 1867 and 1869 by a vote of 159 to 25. For this bill the whole Massachusetts delegation, including both her present Senators, voted. It was never acted on by the Senate. In 1872 a similar bill passed the House without a division.

The Democratic party has invariably supported the position of Madison and Jackson, that the power of removal is vested by the Constitution in the President, and cannot be controlled by legislation.

I have not, in this brief recital, undertaken to state fully the argument against the claim that the Senate has, under the Constitution, any share in the power to remove executive officers, or against the claim that such share may be conferred upon it by law. Nor have I referred to the great authorities on either side. One of the best statements of the views of those who claim that the power of removal cannot be exercised without the consent of the Senate is Mr. Edmunds's opinion in the case of the impeachment of President Johnson. Perhaps the ablest statement of the other side is a pamphlet, published anonymously in 1835, entitled “An Appeal from the New to the Old Whigs,” now known to be by Mr. Charles Francis Adams. Mr. Adams will confer a benefit on the public by causing the pamphlet to be republished, or, better still, by restating the constitutional argument as it may now appear to him.

If we would cure the existing evils in the civil service, we must seek some other method than that of establishing by legislation a tenure of office independent of the Executive, or placing the executive power of removal under the guardianship of the Senate. If that be attempted, the reformer will furnish the spoilsman with a formidable, if not impregnable, constitutional defense. The evil of a system which treats public offices as patronage, whether to be used for the service of party or of individual ambitions, will not be cured, and, experience warrants us in saying, will not be diminished, by transferring the power of appointment and removal from Executive to Senate, or from Senate to Executive, or from either to the House of Representatives, or to political committees.

The complaints of the leaders of the opposition about the abuse of executive power under Jackson and his successors were quite as emphatic as any we have lately heard. Patronage, however agreeable to patron or to dependent, will always be odious to those who do not share its benefits.

It is the fashion to say that the evil came in with Andrew Jackson, and it is commonly supposed that the blunt and coarse speech of Marcy—"to the victors belong the spoils"—is the first open avowal of the doctrine. It will not be extirpated unless original appointments are made without regard to party, for it cannot be expected that if the President hold none but members of his own party eligible to public office, his successor of the other party will fail to avail himself of his power of removal.

It is said that Mr. Jefferson made but thirty-nine removals from office during his term. He undoubtedly exercised a moderation in that particular of which we can hardly expect human nature to be often capable. When he was inaugurated, he found himself, according to Mr. Benton, almost the only man of his party in office in the country. Benton says: "I heard an officer of the army say there was but one field officer in the service favorable to him. This was the type of the civil service." Jefferson himself says that "Republicans had been systematically excluded from the service of the country"; . . . "they have been excluded from all offices from the first origin of the division into Republican and Federalist." The principles on which he thinks appointments and removals should be made he states in letters to his confidential correspondents, especially to Mr. Lincoln: "No man should be removed for mere opinion's sake." But "election-

eering activity, or open and industrious opposition to the principles of the present Government, legislative and executive," is good cause for removal.

"Your present situation will enable you to judge of prominent offenders in your State in the case of the present election. I pray you to seek them, to mark them, to be quite sure of your ground, that we may commit no errors or wrongs; *and to leave the rest to me.*"

On the other hand, he writes in July, 1807:

"In appointments to public offices of mere profit, I have ever considered *faithful service in either our first or second revolution* as giving preference of claim, and that appointments on that principle would gratify the public and strengthen that confidence so necessary to enable the Executive to direct the whole public force to the best advantage of the nation."

He means by the second revolution the political revolution which put him in the place of John Adams. So that activity on one side is a cause of removal, and activity on the other a claim to appointment.

In stating that mere political opinions do not furnish ground for removal, Mr. Jefferson makes two pretty serious exceptions.

"Good men, to whom there is no objection but a difference of political principle, are not proper subjects of removal, *except in the case of attorneys and marshals.* The courts being so decidedly federal and irremovable, it is believed that Republican attorneys and marshals, being the doors of entrance into the courts, are indispensably necessary as a shield to the Republican part of our fellow citizens."

The other exception is that class of Federalists whom he called monarchists, among whom he classed both Adams and Hamilton, and all "the Essex men," and "the desperadoes of the quondam faction in and out of Congress." "These I consider incurables, on whom all attentions would be lost, and therefore will not be wasted." "A second class, at the head of whom is our quondam colleague [Hamilton], are ardent for introduction of monarchy, eager for armies, making much more noise for a great naval establishment than better patriots. This last class ought to be tolerated but not trusted." He asks Mr. Lincoln to furnish him with a list of "the Essex men now in office in yours and the neighboring States." "Of the monarchical Federalists I have no expectation. They are incurable, to be taken care of in a mad-house, if necessary." He says that "the late session of the

legislature in Connecticut has been more intolerant than all others. We must meet them with equal intolerance. When they will give a share in the State offices, they shall be replaced in a share of the general offices. Till then we must follow their example." He does not even propose to apply his famous test—"Is he honest? Is he capable? Is he faithful to the Constitution?" until he has corrected the errors of his predecessors. "That done, I shall return with joy to that state of things."

Mr. Jefferson hoped to attract to his support a large portion of the Federalists, whose division among themselves had made his election possible. He frequently avows this as a reason for a sparing use of his power of removal. He says, in his letter to Rush: "I know that, in stopping thus short in the career of removal, I shall give great offense to many of my friends. The torrent has been pressing me heavily, and will require all my force to bear up against."

The truth is, Mr. Jefferson found, or believed he found, that every man who agreed with him in political opinion had been systematically excluded from federal office ever since there had been avowed party divisions, and this in a government which had existed but twelve years. He meant to restore an equilibrium by appointing his own friends only. He meant to remove all marshals and district attorneys who were not of his way of thinking. He announced that active service in his support was a reason for appointment, and active service against him ground for removal. In confining himself within these limits, which he does in the hope of bringing to the support of his party large accessions from the other, he has to give great offense to many of his friends, and to resist a torrent which it required all his force to bear up against. The rules which he adopted and avowed for his government in appointments and removal were adopted with reference to their influence on the strength of his party. Jefferson's practice was better than his rules. Considering that he found that in the national service, both civil and military, his friends had been systematically excluded by his predecessor, and that a like policy had prevailed in some, if not all, of the federal States, he did as well as could be expected from political flesh and blood. But the evil seed had been sown and had sprouted, and the tree was rooted and well grown more than a quarter of a century before the accession of Andrew Jackson.

The evil, then, with which we are undertaking to deal came in with party government. Is it inseparable from party government? Many good men think it is. They say that the existence of political parties is necessary in a free country; that the men who are active, and efficient, and popular in the party which composes the majority of the American people are likely, as a rule, to possess the character and capacity required for executive office; that to permit the dominant party to fill the civil service from the men who are its trusted and active leaders in various localities, and to hold it responsible for their performance of duty, secures, in the main, energy, honesty, and responsibility; that such an arrangement also secures the constant and jealous watchfulness of the opposition upon the civil service in all its detail; that no other method of selection will secure integrity, tact, wisdom, or even good manners, in the subordinate, or a feeling of responsibility in the superior, for officers in choosing whom he has no voice; that until the service of the Republic ceases to be honorable, the ambition to serve her will be honorable, and that the hope of being rewarded by public office, in the proper exercise of executive discretion, for honest political effort, is as natural, reasonable, and needful a stimulant as the hope of promotion in army or navy.

These reasons are not without force, although most of them have been carefully considered and answered by those who would introduce other methods. If the only question were how to get a capable body of officers, I do not feel sure that the political method of getting them is not as good as any likely to be devised. But the complaint is not chiefly that the public is not fairly well served. It is that the appointment to and removal from office is a disturbing influence, and sometimes a corrupting influence, upon the elections and upon legislation. Armies are necessary. Standing armies are necessary. But in free States we hear little general discussion of methods of raising them, and disciplining them, and rendering them fit for military service, and a great deal of securities which shall prevent them from being used against the State which employs them. We take a hundred precautions that they may not become dangerous to ourselves, for one that they may be dangerous to our enemies.

The permanence of our institutions must depend upon the purity of our elections. Public opinion, so jealous of intrusting the Executive with military force, is comparatively indifferent to

the exercise of a power capable of tenfold the effect upon the freedom of elections which our present regular army could exert. The number of national office-holders is probably more than eighty thousand. But it is not merely the holders of office, but the aspirants for office, whose hopes and fears may be influenced by executive power.

It is remarkable that the recent demand for new securities against danger to the purity of election and administration from the existing methods of appointment to office should come from the dominant party quite as earnestly, to say the least, as from its antagonist. The Republicans of Massachusetts, in 1873, when they had been in power in their own State for twenty-six years, and their party had entered upon its fourth national administration, demanded that the offices "should thenceforth be used to serve the people and not to bribe them." It has reiterated the demand in some form in every State convention since. In its national platforms of 1876 and 1880 it put on record, when it invited the confidence of the people, pledges, the fulfillment of which it cannot longer postpone without dishonor. If there is any proposition concerning which the highest authorities in this country concur, it is that of the injurious nature of a partisan civil service. President Garfield, like his two immediate predecessors, emphatically expressed his disapprobation, and asked for the support of legislation and public sentiment in his efforts to make merit, and not opinion, the sole passport to office. The early Presidents are on record to the same effect. Mr. Madison declared that the removal of a competent officer on account of his opinion would be good ground for impeachment of the President. Jefferson, as we have seen, justified his removals by the desire to give his supporters a fair proportion of offices. Jackson was fully committed by public and private pledges to the rule from which he so conspicuously departed.

I stated, long ago, more than once, my own objections to the present system. The limits of this article do not permit me to repeat them here in detail. Chief among them is its tendency to influence and increase that party spirit against which Washington, in his farewell address, warns us as the one greatest danger to our country. Party, within proper limits, is useful and necessary. It is the association and organization of men who think alike concerning the Republic to carry opinion into practice. It is the only method by which "principles not

men" become the governing forces in the state. It is difficult to see how Washington himself could have remained ten years longer in public service without becoming a party leader. With this weapon liberty and humanity have achieved their greatest political victories. The men who affect to be wholly independent of party do not long retain their hold upon public confidence. The ferry-boat statesmen who perpetually ply from side to side do not make their voyage useful to mankind, and very seldom pick up a passenger. The man who tries to spend his life on the fence does no good labor in either field, and is quite apt to discover that his seat is of barbed wire. But there is no legitimate connection whatever between sound political principles and the transmission and distribution of mails, the survey of public lands, the collection of internal revenue or duties on imports, the service of federal process, civil or criminal, any more than between sound opinion and service in the army or navy. A partisan civil service, substituting personal for public ends in political activities, in the end degrades party.

But party spirit is an unmixed evil when it transfers to that association a love, allegiance, and obedience due only to the State itself. What must be the effect in inflaming that spirit, to have nearly one-half of the people continue for a generation to feel that they are excluded from all share in the government by reason of their opinion, even from those functions which their opinions do not affect? To them the government becomes only the representative of their antagonists. It is, to their minds, only organized party. Every act of its necessary authority is viewed as the act of an enemy. Its victories in war, its most successful and beneficent administration in peace, are regarded with jealousy and dislike, as tending to prolong the rule of foes, and perpetuate their own exclusion from power. If this country has not witnessed the extremities of the spirit of faction which has destroyed other republics, it has enough in its own experience to prove the wisdom of attempting to lessen the evil. It has seen the pitiable exhibition of some of the early Federal leaders, plotting to overthrow the administration of John Adams, voting for Aaron Burr, and worse than indifferent to their country's success in its naval strife with Great Britain. It has seen, in more recent times, many of the leaders of another great party in one part of the country rebelling, in another sympathizing with rebellion. In Maine, the State which for pure English

blood, for general popular intelligence, for education, stands at the head of all civilized communities, it has seen the attempt to commit larceny on a gigantic scale by purloining a whole State government at once, with the apparent sympathy of nearly one-half the people. Who can believe that if party strifes in this country involved only those few offices whose functions are affected by the political opinions of those who hold them, the bulk of any party could be so influenced by this spirit as to render such things possible?

It is a great delusion to assume that every system is administered at its worst and not at its best. I believe there are many States where the evil stops here, and where public sentiment and the men who hold office or possess influence with the appointing power would never seek to cause that power to be used except for the best end. But the tendency has been in many quarters to make of the public officers a compact and disciplined cohort for the service of the person to whose influence their appointment is due. Whether this person be President, or senator, or representative, or some political adventurer who has gained the ear of the President, the effect is wholly vicious. It is doubtless true that the existence of such a state of things generates a resisting power which sooner or later is sufficient for its overthrow. But the necessity for such resistance is itself an evil. A political contest on one side for the mere promotion, and on the other side for the mere defeat, of personal ambitions, tends to turn the attention of the people from the discussion of great principles. Even some of our best civil service reformers seem to have lost their sense of great public evils, and sometimes even their capacity for indignation at great public crimes, in their honest zeal for the promotion of this reform.

While party contests are largely struggles for the possession of office, it is inevitable that the demand should be made upon the holders of salaried office to contribute to political expenses. This demand cannot well be resisted, and salaries must sooner or later be fixed with reference to their liability to this tax. Thus the whole people are indirectly taxed to pay the expenses of the dominant party.

One of the most considerable evils attendant upon the existence of a political machine is its tendency to lead men to trust to its efficiency to secure political results, instead of relying on appeals to the understanding of the people and on voluntary and

disinterested labor. This is especially true in the lately reconstructed States. Converse with almost any Southern Republican leader as to the means of overthrowing the illegal and criminal rule of the dominant minority in his State, and his first condition of hopeful exertion will be that the President shall "recognize" this or the other class of politicians. I do not expect to see a political revolution in any Southern State accomplished by any set of men who do not trust to their own unaided strength and are not absolutely indifferent to the smiles or frowns of the Executive at Washington.

Another very serious evil in present methods is the sudden and often cruel removals to which faithful and worthy officials, especially women, are now exposed. I have known very numerous instances, even during the last administration, where, without the knowledge of the President or head of the department, soldiers and soldiers' widows have, without warning and without cause, been removed from employments on which they and their households were dependent for bread, where, if a private manufacturer had dealt with his laborers in the same way, he would have deserved and received the indignation and contempt of the entire community.

We have to deal with an evil which came in with party government, which has always attended it in this country, which is deeply intrenched in American habit and opinion, which, under our complex systems, must be cured in the States as well as in the nation, and in the perpetuation of which the interests and ambition of a very numerous, able, and influential body of men are concerned. To cure it demands the combined and sincere effort of both political parties, or at least of so many persons in each political party as to render an attempt to return to it after it is once abandoned certain defeat to the party which makes it.

The provisions of the Constitution upon the whole subject of appointments to office are very simple. The President may nominate, and, with the advice and consent of the Senate, may appoint. Congress may vest the appointment of inferior officers in the President alone, in the heads of departments, or in the courts. The individual senator has no constitutional relation to the President. His opinion, like the advice of any other citizen, depends for its weight with the Executive solely upon the President's sense of the wisdom, integrity, and means of information of the man who gives it. To make a compliance with his opinion a con-

dition of his support of the administration in other matters, or the obtaining such support by the Executive by the use of the appointing power, is to establish a corrupt relation between the two.

The constitutional responsibility for the whole matter is with the President. One of our brightest writers for the press was told that there was a rumor that he was to publish a treatise on parliamentary law. "If I do," he said, "I shall sum it all up in one sentence: 'Never have an ass in the chair!'" The remedy for the evil complained of in the matter of executive appointments and removals is to have a President who is in earnest. Legislation cannot remove the appointing power from the depository where the Constitution has placed it. It cannot prevent the President from seeking counsel where he chooses. The chief office of the civil service reformer must be to create a public sentiment which will support the President in the reform.

I do not understand that the advocates of the bill drawn by Mr. Dorman B. Eaton, chairman of General Grant's Civil Service Commission, which was introduced by Mr. Pendleton at his request, and reported to the Senate unanimously by the Committee on Reform in the Civil Service, think they have found a machine which is at once to mow down the whole growth of evils in our official system, so that they never shall spring up again. They propose only to supply to a willing President the necessary instrumentality for the better performance of his duty. The bill will doubtless require some amendments of detail. But its scheme, as I understand, is in substance this:

It recognizes the prior claim of soldiers and sailors to the preference to which they are now entitled.

Its rules are subject to the approval of the President.

It provides for open, competitive examination for testing the capacity of applicants for the public service, appointments to be made by selection from among those graded highest as the result of such examination.

The public service to be graded, and original entrance to be at the lowest grade.

There is to be a period of probation before absolute appointment.

Promotions are to be from the lower grades to the higher, on the basis of merit and competition.

This plan is not to be applied to workmen or laborers, and only to those offices or customs districts where the whole number of clerks or officers embraced in it is not less than fifty.

This plan is to be limited in its application, as above stated, until it has been fully tested. It has the recommendation of having broken up the corrupt system which so long prevailed in England. It is that which President Grant and President Hayes desired to put in force. It has worked well in several important public offices. Its adoption will be an emphatic expression, both by Congress and Executive, of a desire to coöperate in getting away from the evils of the existing system. It will be a setting out upon the right road. Whether it prove the best system or no, it will, at least, get us away from the present one. It is difficult to suggest any considerable harm that the experiment of appointing, after probation, persons who have succeeded in these competitions will do.

It is said that it will result in a body of public servants, taken only from the wealthier classes, who are likely to be the better educated, who will have an undisturbed tenure of office, in which they will be independent of public opinion, and will be haughty, insolent, and inefficient. If it should prove true, on experiment, that such is the character of the service, he little understands the temper of the American people who fears that its tenure will be a long one. Experience will doubtless disclose defects in the proposed bill, and will, it is to be hoped, disclose their cure. But it will enable the Executive to make an honest and earnest effort to take the civil service of the country out of politics, under circumstances which promise the coöperation of Congress and the support of public opinion.

GEORGE F. HOAR.